FOR ARGUMENT

No. 78-1248

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONICS CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief we showed that the action brought by respondents ("requesters") should not be permitted to proceed and that any one of three independent grounds requires reversal of the judgment of

the Court of Appeals and dismissal of the complaint. In summary, those grounds are: (1) there is no case or controversy as required by Article III of the Constitution; (2) there has been no "improper withholding" within the meaning of the Freedom of Information Act ("FOIA") by the Consumer Product Safety Commission ("CPSC") and thus the requesters' complaint fails to state a claim upon which relief can be granted; and (3) the Court of Appeals erred in refusing to dismiss the requesters' action under established principles of comity and finality of judgments. We do not believe that the requesters have properly focused on these issues. Indeed, the second issue is virtually ignored and the others are treated against a backdrop of hypothetical facts and speculative fears that a reversal of the decision below will result in a Pandora's box of future races to the courthouse.

The requesters also argue that application of principles of comity here would do violence to their due process rights. Moreover, they attempt to circumvent petitioners' ("manufacturers") case or controversy point by contriving an imaginary disagreement as to the effect of the Delaware orders and suggesting that the joinder of the manufacturers supplies whatever adverseness may be lacking between the requesters and the agency. We shall demonstrate below the flaws in each of these arguments as well as deal with the broad points discussed by the requesters.

1. The Requesters Mistakenly Attempt To Eliminate the Issue of Whether Information Is Being "Improperly Withheld" by the CPSC Within the Meaning of the FOIA.

Contrary to the requesters' claim (Resp. Br. 2, 16), the manufacturers do not rely on only "two [independent] legal theories" to support their position that the requesters' action should not be permitted to proceed. In thus mischaracterizing our position and also in refashioning the Questions Presented (Resp. Br. 2), the requesters omit as an independent issue in this case an important question presented by the manufacturers (Pet. Br. 4), namely, whether information is "improperly withheld" within the meaning of the FOIA, 5 U.S.C. § 552(a)(4)(B), by an agency that has not released the information solely because it has been permanently enjoined from doing so by another district court.

This independent issue has been discussed at length in our opening brief, in which we established that there is no basis in the FOIA or its history for concluding that compliance with a judicial decree permanently enjoining disclosure can be parlayed into a claim of "improper withholding" (Pet. Br. 30-36). We also demonstrated that the equitable discretion retained under the FOIA enables a court to respect an injunction of a coordinate federal court (Pet. Br. 36-38).

The requesters do not challenge, in any real sense, our position on the "improper withholding" issue. Instead, they seek to bypass the issue by asking this Court to ignore the Delaware preliminary and permanent injunctions and to treat the temporary restraining orders as never having been operative (Resp. Br. 32). By this tactic, the requesters are guilty of the very thing they accuse the manufacturers of—"asking this Court to close its eyes to reality" (Resp. Br. 29). There never has been a moment since the requesters brought their suit in the District of Columbia that the CPSC has not been enjoined from honoring their FOIA request. The requesters' approach also ignores

established legal principles. There can scarcely be a question that even temporary restraining orders must be obeyed. *Walker* v. *Birmingham,* 388 U.S. 307 (1967); *United States* v. *United Mine Workers,* 330 U.S. 258, 289-95 (1947).

Thus the reasons the requesters proffer for brushing aside the "improper withholding" issue, and announcing that "it will not be discussed further by requesters" (Resp. Br. 33), cannot withstand scrutiny. The fact is that the CPSC is prohibited from disclosing the information at issue by a permanent injunction entered by a court of competent jurisdiction. Accordingly, the requesters simply are not entitled to relief under the FOIA.

2. The Requesters Endeavor To Circumvent the Issues Presented for Decision by Inviting This Court To Disregard the Impact on This Case of the Permanent Injunction and Earlier Orders Entered in the Delaware Litigation.

In their brief, the requesters play a game of "make believe" in which they vainly strive to turn back the clock. Both in their second Question Presented (Resp. Br. 2) and in their argument that "the Court's Focus Should Be On the Cases As They Stood When This Action Was Filed, Disregarding The Issuance Of The Automatic Restraining Orders in Delaware" (Resp. Br. 30), they ask the Court to decide this case on a hypothetical set of facts. Thus, the requesters would (1) erase the permanent injunction issued by the Delaware District Court and now affirmed in its entirety by the Third Circuit and (2) even wipe the slate clean of the preliminary injunction and temporary restraining orders.

The basic difficulty with the requesters' suggested approach is that it is inconsistent with the January 16, 1978 order of this Court vacating the Court of Appeals' first judgment in this case:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit *for further consideration in light of the permanent injunction* entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104." (A. 62; emphasis added.)

There can be no serious doubt that the focal point of decision in this case must be the present, with a permanent injunction in place. This is especially so since the most recent grant of certiorari for review of the Court of Appeals' judgment was responsive to a Petition that stressed in every Question Presented that a Delaware permanent injunction was outstanding. The requesters attempt to justify their approach by suggesting that a decision based on a fictitious set of facts that excludes the Delaware permanent injunction might have greater precedential value (Resp. Br. 33). In view of the rule against advisory opinions, this proposal could not be more devoid of merit.[1]

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[1] The decisions cited by the requesters (Resp. Br. 30-31)—*Trainor* v. *Hernandez,* 431 U.S. 434 (1977); *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208 (1974); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961)—have no relevance to the requesters' argument that the permanent injunction entered by another court be disregarded. It is not questioned that the Court can and does overturn lower court decisions on the merits when it discovers fatal threshold defects going to the power or propriety of rendering such decisions, as it did in the three instances relied upon by the requesters. However, that is not the issue here.

3. The Requesters Would Evade Consideration of Established Principles of Comity by Gross Speculation as to How Future Disputes Between Requesters and Submitters Will Be Presented for Judicial Resolution.

The requesters make a misguided attempt to cast this case in most unrealistic "race to the courthouse" terms (*e.g.*, Resp. Br. 2, 16, 19, 41-47). But the requesters cannot even settle in their own minds how to frame the frightening prospect they imagine will occur.[2] Hence, on a single page (Resp. Br. 19; *see also id.* at 43-45), they simultaneously predict that if the manufacturers prevail the appalling results will be:

> "[H]ence [submitters] can always win the race to the courthouse."

> "If a race to the courthouse is to be the method of deciding the proper forum, requesters in future cases will win most races . . . ."

We believe that the requesters would have advanced the resolution of the issues by a more serious effort to address the questions of orderly judicial administration raised by the District of Columbia Circuit's decision.[3] In that decision, the Court of Appeals directed

[2] On another front, the requesters cannot make up their minds as to the significance of temporary restraining orders ("TRO's") in reverse-FOIA cases. On the one hand, they assert that such TRO's should be disregarded as "automatic" (Resp. Br. 18, 30, 32). But on the other, they propose that these same TRO's are deserving of such regard that the CPSC should be faulted for consenting to their entry in the Delaware litigation (Resp. Br. 38).

[3] Thus the requesters assert that the doctrine of comity, for example, "applies only when the parties are the same in both actions . . ." (Resp. Br. 35; *see also id.* at 18). No effort is made to deal with the many cases cited by the manufacturers (Pet. Br. 46-47) and the Solicitor General (Sol. Br. 24-31) in their opening briefs showing that this view is in error. *Great Northern Ry.* v. *Nat'l R.R. Adjustment Bd.*, 422 F.2d 1187 (7th Cir. 1970), is the sole case relied on by the requesters. Their reliance is misplaced. *See* Pet. Br. 47 & n.29.

its District Court to disregard the Delaware permanent injunction and forge ahead on a collision course with the Delaware District Court and, now, the Third Circuit (Pet. Br. 4). It is our position that the Court of Appeals' direction to the court below is unwarranted under established principles of comity and that the Court of Appeals' reasons for departing from those principles are unsound (Pet. Br. 42-52). These are, in our judgment, the issues that need to be addressed.[4]

4. Giving Preclusive Effect to the Delaware Permanent Injunction Does No Violence to the Requirements of Due Process.

The manufacturers' third independent ground for reversal of the court below is that established principles of comity and finality of judgments mandate that the District of Columbia District Court not proceed to a trial on the merits. The requesters assert that such a result does violence to due process (Resp. Br. 18,

[4] This Court, in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976), recognized that unlike the general approach governing state-federal concurrent jurisdiction, as between federal courts "the general principle is to avoid duplicative litigation." In their zeal to cast this case in terms of a race to the courthouse, the requesters erroneously conclude that "[o]f particular relevance to this case is that, although the federal action was first filed in *Colorado River*, jurisdiction went to the state court . . ." (Resp. Br. 47). In fact, the state proceeding was the prior case, and was, in the words of this Court, "a single continuous proceeding for water rights adjudication which antedated the suit in District Court." 424 U.S. at 819. In any event, as both the Solicitor General and the manufacturers pointed out in their opening briefs (Sol. Br. 18; Pet. Br. 43), *Colorado River* supports the view that principles of comity preclude the District of Columbia suit from now going forward.

36-41). No similar due process objection is interposed to the other two independent grounds the manufacturers rely on for reversal.

We demonstrated in our opening brief that principles of comity support prohibiting relitigation of a matter settled by a permanent injunction against the CPSC in another forum (Pet. Br. 42-62). We also pointed out that this case does not require the pronouncement of a general rule of preclusion of relitigation by FOIA requesters who have knowledge of reverse-FOIA proceedings but fail to intervene. This is so because of the particularly compelling facts presented by the deliberate choice of these two sophisticated and litigation-oriented requesters not to intervene in nearby Delaware, an admittedly convenient forum.[5] *See* Pet. Br. 54-55. In addition, the fact that this is the first time that this Court has considered the question of judicial administration of reverse and direct FOIA suits counsels in favor of proceeding cautiously.[6]

We find difficult to comprehend the requesters' continued refusal to accept any responsibility for their deliberate choice not to intervene in Delaware but to proceed with a duplicative lawsuit instead, while at the same time pressing "due process" objections. Indeed, they themselves note "the breadth of the opportunity to intervene today in federal courts under Rule

[5] Respondents concede that "it is true that in this case the disadvantages to the requesters based on the location of the proceeding in Delaware are not very severe . . ." (Resp. Br. 42).

[6] The District of Columbia Circuit was not so circumspect. Its attempt to fashion sweeping procedural rules applicable to FOIA litigation is not even acceptable to the requesters, who themselves disavow as untenable the class action solution gratuitously offered by that court (Resp. Br. 13 n.4).

24" (Resp. Br. 41 n.12). We believe that there is no justification for experienced litigators such as these requesters not to have availed themselves of this broad opportunity so as to avoid the very procedural tangle of which they now complain (Resp. Br. 30).

As we have already noted (Pet. Br. 53 n.36), and as the Solicitor General has fully demonstrated (Sol. Br. 24-31), due process requires only that persons have an *opportunity* to be heard. *E.g., Montana* v. *United States,* 440 U.S. 147, 153-54 (1979). Nonparties, such as the requesters, who seek relief in subsequent litigation that effectively would nullify the results of prior litigation in which their interests were adequately represented [7] and in which they deliberately chose not to intervene can be barred from relitigation without doing any violence whatsoever to their due process rights.[8]

[7] Requesters attempt to equate the CPSC with a bank or insurance company or other true "stakeholder" in order to deflect the effect of the CPSC's representation of their interest in the disclosure of the information in question (*e.g.*, Resp. Br. 19, 38). Unlike a true stakeholder, however, the CPSC is not a disinterested third party in a dispute by others over a corpus, as is attested to by the Solicitor General's recent petition for a writ of certiorari (No. 79-521) seeking this Court's review of the Third Circuit's affirmance of the Delaware injunction.

[8] The requesters' reliance (Resp. Br. 40-41) on *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.*, —— U.S. ——, 99 S. Ct. 1551 (1979), is misplaced. Columbia Broadcasting System ("CBS") sought only to supplement the 1950 amended consent decree controlling the activities of the American Society of Composers, Authors and Publishers (*id.* at 1558), and the 1966 amended consent decree controlling the activities of Broadcast Music, Inc. (*id.* at 1558 n.20) so as to require an *additional* alternative form of licensing to be available to licensees. *Id.* at 1559. Thus, far from seeking to nullify the earlier decrees (as the requesters would do here), CBS sought to extend the protection that they afforded. As the Solicitor General has pointed out at greater length in his brief

Finally, as the Solicitor General and the manufacturers have noted (Sol. Br. 26; Pet. Br. 52 n.35), the Delaware Court is still available to the requesters for any appropriate relief which circumstances warrant or due process requires.

5. The Absence of a Justiciable Case or Controversy Between the CPSC and the Requesters, Both of Which Agree That the Information Should Be Released, Cannot Be Cured (a) by Contriving a Dispute as to the Effect of the Delaware Orders or (b) by Joining Third Parties Against Which There Can Be No Relief.

We demonstrated in our opening brief (Pet. Br. 20-30) that the requesters' action is not justiciable under Article III of the Constitution, which requires "adverse parties whose contentions are submitted to the court for adjudication," *Muskrat* v. *United States*, 219 U.S. 346, 357 (1911). Specifically, we demonstrated that the requesters' action must be dismissed because both the requesters and the CPSC—the only defendant against which relief is or can be sought—desire precisely the same result, namely, release of the information to the requesters (Pet. Br. 21-24). *E.g., Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971) (*per curiam*).

(Sol. Br. 29-30), there is a vast difference between permitting subsequent litigation "when the second suit seeks relief that would effectively nullify the decree of the first court" (*id.* at 30) and permitting subsequent litigation when the second suit "seeks relief that is merely logically inconsistent with the prior judgment" (*id.* at 29). *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), which the Court cited in the *Broadcast Music, Inc.* decision, 99 S. Ct. at 1559, likewise involved private litigants who sought to supplement the consent decree relief obtained by the government, which they believed "did not go far enough." 366 U.S. at 687.

The requesters seek to avoid application of these principles by offering two bootstrap theories of Article III jurisdiction, neither of which has any merit.

Initially, the requesters contend that there is a case or controversy because they and the CPSC have a "continuing disagreement as to the effect of the Delaware orders . . ." (Resp. Br. 21; *see id.* at 16). However, it is indisputable that the CPSC is permanently enjoined, and was temporarily enjoined, from releasing the information sought by the requesters. It is also indisputable that the District of Columbia Court of Appeals has remanded the case to the District Court solely for resolution of the requesters' right to the materials. ("This case, therefore, must finally continue toward a decision on the merits . . ." A. 85-86.) It was of course the requesters' asserted right to the information and not the effect of the Delaware orders that they brought to the District Court to adjudicate (*see* A. 19). But where a party seeks relief from another party which agrees that the requested relief should be granted, there is nothing for a court to adjudicate. Under these circumstances, not only would district court action "have anomalous results," as the Solicitor General argues (Sol. Br. 21 n.10), it would be wholly inconsistent with Article III.

The requesters rely primarily on their second bootstrap argument (Resp. Br. 16, 22), in which they resurrect a jurisdictional joinder theory that Judge Richey found "ingenious" but unavailing (A. 30). Even the District of Columbia Court of Appeals, in all its pains to find an Article III case or controversy, did not quarrel with Judge Richey's conclusion (Pet. Br. 25 n.12). As Judge Richey noted (A. 30), the requesters' theory, at bottom, is that their

disagreement with the manufacturers over whether the information should be disclosed provides "the missing jurisdictional ingredient of case or controversy" between them and the CPSC.

This theory is plainly incorrect for two interrelated reasons, which we noted in our opening brief (Pet. Br. 25 n.12). First, the requesters seek no relief from the manufacturers and, indeed, cannot, since the requesters have no cause of action against them. Second, joinder under Rule 19 of the Federal Rules of Civil Procedure requires preexisting jurisdiction over the cause of action, and absent a case or controversy between the requesters and the CPSC, there is no such preexisting jurisdiction. In short, Rule 19 cannot be used to extend the jurisdiction of the federal courts (Pet. Br. 25 n.12). The requesters put forward no valid reason for departing from these established principles. Nor do the authorities they cite support their position.

United States v. *Lovett,* 328 U.S. 303 (1946), relied on by the requesters (Resp. Br. 16, 24), is not apposite. The United States, the defendant, had refused to disburse funds to the plaintiffs, even though the Department of Justice felt that the prohibitory statute was invalid. Special counsel appeared as amici to defend the statute, "representing the House, the Congress, the United States." 66 F. Supp. 142, 143 (Ct. Cl. 1945). Consequently, it is clear that there was adverseness, since the executive branch refused to pay the funds and special counsel, also representing the "United States," maintained that the United States had no obligation to do so.[9] This Court has experienced other instances

[9] The requesters cite a number of other cases that are equally irrelevant. In *Pasadena City Bd. of Educ.* v. *Spangler,* 427 U.S. 424 (1976) (Resp. Br. 17, 23), the United States intervened in a private school desegregation suit pursuant to a special statute, 42 U.S.C. § 2000h-2, which provided that "the United States shall be entitled to the same relief *as if it had instituted the action.*" 427 U.S. at 430 (emphasis added). Thus, there clearly was adverseness between the United States and the school board defendants. Likewise, nothing could be more plain than the adverseness between the parties plaintiff and parties defendant in *North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43 (1971) (Resp. Br. 17, 23), regarding the constitutionality of the North Carolina Anti-Busing Law at issue.

The parties also were clearly adverse in *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977) (*en banc*) (*per curiam*), *cert. denied,* 434 U.S. 1009 (1978) (Resp. Br. 24 n.7), in which the government vigorously opposed the claims of the plaintiffs, federal judges, for additional compensation.

Similarly, the deportation cases relied on by the requesters (Resp. Br. 24 n.7), *Cheng Fan Kwok* v. *Immigration & Naturalization Serv.,* 392 U.S. 206 (1968) and *Foti* v. *Immigration & Naturalization Serv.,* 375 U.S. 217 (1963), stand for nothing more than the ability of truly adverse parties to agree that a court has jurisdiction to resolve their dispute. Quite unlike the CPSC here, which agrees that the information should be disclosed to the requesters, in both *Cheng Fan Kwok* and *Foti* the government sharply disagreed as to whether the plaintiff-alien was entitled to the relief he sought (in *Cheng Fan Kwok,* a stay of deportation, and in *Foti,* a suspension of deportation).

where different departments or agencies of the United States have appeared before it with opposite attitudes as to whether a judgment should be affirmed or reversed.[10]

The requesters miss the thrust of *United States* v. *Johnson,* 319 U.S. 302 (1943) (*per curiam*) (Resp. Br. 23 n.6). Roach, the collusive plaintiff, sued his landlord for excessive rent collections. The defendant asserted that the Emergency Price Control Act of 1942

[10] *E.g., Purolator Products, Inc.* v. *FTC,* 389 U.S. 1045 (1968) (Solicitor General, as amicus, contended that FTC had erred in disposition of price discrimination proceeding and urged that certiorari be granted; FTC opposed grant of certiorari).

was unconstitutional. Significantly, when the United States intervened, it not only moved to dismiss the suit as collusive, it also argued before the district court and this Court in support of the Act's constitutionality. 319 U.S. at 303. Under the requesters' theory, the Court would have decided the merits in *Johnson,* since, as the requesters put it (Resp. Br. 22), there was a "presentation of both sides of the controversy to the court." But the Court did not. It ordered the case dismissed for want of adverseness. 319 U.S. at 305. *See also* Pet. Br. 22, 23.

The requesters' reference to *Sibron* v. *New York,* 392 U.S. 40 (1968), likewise fails to advance their position (Resp. Br. 25). When the federal or a state government brings a criminal proceeding against a defendant it can hardly be said that there is no adverseness. If at some later point on appeal the prosecutor decides that the trial court committed reversible error, there can be no question that the judiciary, in protection of its own processes of criminal justice, has the right to scrutinize the propriety of vacating the conviction.

The suggestion that the consent decrees negotiated by the Securities and Exchange Commission or the Antitrust Division expose a fallacy in petitioners' reasoning is equally specious. Litigating parties who are truly adverse may ultimately consent to injunctive orders reflecting the resolution of a genuine controversy. But that does not alter the fact that there was an initial controversy. If there had not been, the arrangement would have been collusive and an abuse of the judicial process.[11]

[11] There is no "inconsistency," as the requesters would have it (Resp. Br. 27), between the manufacturers' Article III position and their position that the requesters should have intervened on the side of the CPSC in the Delaware litigation. There plainly was adverseness in that litigation between the manufacturers and the CPSC; the requesters' intervention as defendants was not needed to confer Article III jurisdiction. Indeed, just as with joinder, intervention may not be so employed. 7A Wright & Miller, *Federal Practice and Procedure: Civil* § 1917, at 584-85 (1972). *See* Pet. Br. 25 n.12.

Finally, reminiscent of the requesters' ambivalent "race to the courthouse" argument, which we discuss at p. 6 *supra,* the requesters concern themselves with the permutations of theoretical FOIA actions seeking access to documents which an agency is willing to produce as well as documents which it refuses to disclose (Resp. Br. 26-27). The requesters wonder aloud whether they can defeat an adverse ruling by this Court by bringing a contrived suit for both categories of documents, so that the dispute as to the refused documents will permit them to support a fictitious lawsuit as to other documents which the agency would gladly furnish were it not enjoined from doing so. We would hardly believe that the "well-informed" requesters to whom reference is made (Resp. Br. 27) would play that game or expect by doing so successfully to avoid the impact of an outstanding injunction entered by another tribunal.

In summary, the requesters' numerous efforts to circumvent the established principles of law urged by the manufacturers are of no avail. The lack of adverseness between FOIA requesters and an agency that desires to release the requested information but is enjoined from doing so cannot be cured by contriving a disagreement as to the meaning of the injunction or by the presence of parties against which there can be no relief.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, it is respectfully requested that the decision of the District of Columbia Court of Appeals be reversed and that the requesters' complaint be dismissed.

Respectfully submitted,

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